

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
CLERK

MAY 28 2002

Michael N. Milby, Clerk

In Re ENRON CORP. SECURITIES
LITIGATION

RALPH A. WILT, JR.,

Plaintiff,

v.

ANDREW S. FASTOW, et al.,

Defendants.

Consolidated Lead Case No. H-01-3624 ✓

Civil Action No. H-02-0576

2002 MAY 28 PM 1:43
U.S. COURTS
SOUTHERN DISTRICT OF TEXAS
HOUSTON

**THE WILT PLAINTIFFS' RESPONSE AND
MEMORANDUM OF POINTS AND AUTHORITIES
IN PARTIAL SUPPORT AND PARTIAL OPPOSITION
TO MOTION FOR PRELIMINARY SCHEDULING ORDER
IN NON-CLASS SECURITIES FRAUD ACTIONS**

ORIGINAL

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**THE WILT PLAINTIFFS' RESPONSE AND
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1. SUMMARY OF RESPONSE.

Plaintiffs Ralph A. Wilt, Jr., Kieran J. Mahoney, and David I. Levine (the “Wilt Plaintiffs”) support the Motion, in part, to the extent of a briefing schedule for non-class securities fraud cases. Their counsel believed that the Court’s amended Scheduling Order set the briefing schedule for their individual action, but for the sake of efficiency counsel has no objection in principle to deferring motions to dismiss non-class complaints. Such deferral must allow for amended pleadings to add Doe defendants by their true names.

The Wilt Plaintiffs oppose the Motion to the extent it would interfere with the identification of Doe defendants and their inclusion in a further amended complaint. The Wilt Plaintiffs assert only Texas state law claims, for themselves only, so the discovery stay under the Private Securities Litigation Reform Act (“PSLRA”) does not cover them. The Wilt Plaintiffs must be permitted to conduct discovery for the purpose of identifying and amending to add corrupt officials named as Doe defendants on conspiracy theories.

The Wilt Plaintiffs and their counsel, Judicial Watch, Inc., are uniquely positioned and qualified to ferret out, expose, and pursue all relief available for the wrongful conduct of corrupt government officials who have conspiracy liability under the state law claims asserted in the Wilt action. **Neither Lead Counsel in the Consolidated Complaint nor plaintiffs in other individual cases are pursuing this key aspect of the Enron scandal.** The Scheduling Order should permit the Wilt Plaintiffs and their counsel to do so now.

2. LEGAL ARGUMENT AND ANALYSIS.

A. The Wilt Action Is Unique in Pursuing Corrupt Officials.

The First Amended Complaint in the Wilt action names many of the more obvious defendants named in other complaints, e.g. Enron officers and directors, Arthur Andersen personnel, and the Vinson & Elkins defendants. However, in addition to the foregoing “safe” defendants, the First Amended Complaint casts a broader net in pursuing corrupt government officials who bear responsibility – and have legal liability under conspiracy principles – for facilitating and turning a blind eye to the massive fraud that has shaken our economy, the accounting profession, the legal profession, and government. All other groups of defendants – the Director and Officer Defendants, the Accountant Defendants, and the Attorney Defendants – were major contributors and were granted illegal favors and favorable treatment, which materially facilitated the fraud and without which the fraud either would have been impossible or could not have grown, continued, succeeded, and remained undetected for as many years as it was. First Amended Complaint §§ 95-97, 99, 104-111, 291-294. Only after shareholders had lost billions of dollars and it had become politically impossible not to act did any corrupt officials, based on Machiavellian calculations, begin to turn on their former patrons and express a new-found concern for the shareholders whom they had previously helped to defraud. *Id.* §§ 295-96. However, no other plaintiffs are pursuing the government officials who have conspiracy liability.

The Enron scandal is as much a scandal of public corruption as of financial fraud. Both political parties, both sides of Congress, and the last and the current Presidential Administrations have been comprised and pervasively implicated in what is perhaps the largest fraud in history. The Wilt action is unique in seeking to ferret out, expose, and impose liability on the government officials who should be held accountable. Any further Scheduling Order should permit the Wilt Plaintiffs to take the lead in this essential task.

B. The Discovery Stay Does Not Apply to the *Wilt* Action.

The PSLRA provides, in relevant part, as follows:

In any private action arising under this title [the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 77z-1(b)(1).

In any private action arising under this title [the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B).

The *Wilt* First Amended Complaint asserts *no* claim under the Securities Act of 1933 or the Securities Exchange Act of 1934. Rather, that pleading asserts two claims under Texas state law, the first for fraud in stock transactions and civil conspiracy under Texas Business & Commerce Code Section 27.01, and the second for common law fraud and civil conspiracy under Texas state law. These Texas state law claims are brought pursuant to the Court's diversity jurisdiction, not as pendent claims within supplemental jurisdiction. Therefore, according to the plain language of the PSLRA and on the face of the pleading, discovery is not stayed and should be permitted in the *Wilt* action.

In *Angell Investments, LLC v. Purizer Corp.*, 2001 U.S. Dist. LEXIS 17783 (N.D. Ill. 2001), the Court was faced with two related actions, one asserting federal securities fraud claims, the other asserting only state law claims for common law fraud, negligent

misrepresentation, breach of contract, and unjust enrichment. The plaintiff in the federal securities fraud action sought to conduct discovery in that case, in part because discovery was proceeding in the related action asserting only state law claims. The Court properly acknowledged that the discovery stay did not apply to the latter action:

In case number 01 C 6360, which is being reassigned to this court's docket as a related case, Purizer has brought suit against Battelle on claims of common law fraud, negligent misrepresentation, breach of contract, and unjust enrichment. ***Because that case does not contain any claims of violations of federal securities laws, the PSLRA's discovery stay does not apply.*** Plaintiffs [in the federal securities fraud action] characterize this situation as prejudicial to them, but fail to explain how Purizer's head start of approximately one month would harm them, or describe what particularized discovery would be necessary to prevent the undue prejudice that they allege. Accordingly, the court finds that staying discovery [in the federal securities fraud action] pending its ruling on the motion to dismiss will not unduly prejudice plaintiffs.

Id. at *3 (emphasis added).

As recognized in *Purizer*, the PSLRA does not apply to a case asserting only state law claims. Accordingly, any further Scheduling Order should permit the Wilt Plaintiffs to conduct discovery on their state law claims, at least for the purpose of identifying and naming the Doe corrupt officials in a further amended pleading. Given that statutes of limitations are continuing to run, it would be unduly prejudicial to the Wilt Plaintiffs, in addition to being unauthorized under the PSLRA, to delay this essential discovery. *Cf. Digital Equip. Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991) (refusing to stay civil case parallel to criminal proceeding because “memories become stale with the passage of time ... [and] plaintiff needs to proceed forthwith with discovery in order to locate additional parties before the expiration of the statute of limitations”).

In *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162 (S.D.N.Y. 2001), the plaintiff investor brought a federal securities fraud action under Section 10(b)

of the Securities Exchange Act of 1934 and S.E.C. Rule 10b-5. The complaint asserted additional claims for common law fraud, breach of contract, conspiracy, and tortious interference with contract. During the pendency of a motion to dismiss, the plaintiff sought discovery on all state claims except common law fraud. The limitation to “non-fraud” state law claims was “mostly theoretical, ... as plaintiff’s counsel has conceded that the discovery requested on the breach of contract and tortious interference claims would overlap with discovery on the federal securities claims. *Id.* at 164, n. 3. The Court allowed discovery on the state law claims despite the overlap with the federal securities claims, suggesting that discovery would have been permitted on the common law fraud claim, too, if the plaintiff had not limited the issue to non-fraud claims:

Although plaintiff’s state law claims arise from the same set of facts as the federal securities claims, they are separate and distinct claims that cannot be summarily dismissed. Furthermore, even if the federal securities claims are dismissed, the state law claims may survive. See *Connecticut Nat’l Bank v. Fluor Corp.*, 808 F.2d 957, 963 (2d Cir. 1987) (after district court dismissed federal claims, it should not have also dismissed state law claims because jurisdiction was based on diversity of citizenship as well as pendent jurisdiction); see also *Jaquith v. Newhard*, 1993 U.S. Dist. LEXIS 5214, *58, No. 91 Civ. 7503, 1993 WL 127212, at *18 (S.D.N.Y. Apr. 20, 1993) (“Upon dismissal of the RICO claim and a finding that the state claims were not pendent to the remaining 10b-5 claim, the Court cannot automatically dismiss the state claims, but rather must determine if there is an independent basis of jurisdiction for such claims.”).

In *In re Trump Hotel S’holder Derivative Litig.*, 1997 U.S. Dist. LEXIS 11353, No. 96 Civ. 7820, 1997 WL 442135, at *1 (S.D.N.Y. Aug. 5, 1997), this Court was confronted with a federal securities fraud shareholder derivative action that also asserted claims based on diversity of citizenship. Magistrate Judge Henry B. Pitman applied the PSLRA’s automatic stay provisions and denied plaintiffs’ motion to compel discovery. In so doing, Judge Pitman stated:

Plaintiffs next argue that staying discovery in this matter operates unfairly because it effectively penalizes them for alleging a federal securities law claim in conjunction with their state law claims. Plaintiffs contend that had they chosen to proceed on their state law claims alone, the PSLRA [,] by, [sic] its own terms, would be inapplicable and there would be

no stay. Although plaintiffs appear [to] be correct that the PSLRA has no application to actions in which only state law claims are alleged, this is simply not such an action. Having chosen to invoke Section 14 of the Exchange Act, plaintiffs are necessarily subject to the PSLRA. There is simply nothing in either the text or the legislative history of the PSLRA that suggests that Congress intended to except federal securities actions in which there happens to be both diversity of citizenship and pendent state law claims.

I respectfully disagree with Judge Pitman's conclusion and reasoning for a number of reasons. First, the fact that Congress is silent with respect to a case invoking both federal question and diversity jurisdiction cannot be taken as evidence that Congress considered plaintiff's argument but rejected it. Indeed, Congressional silence more likely means that the issue was not considered. Second, the discovery stay provisions are not absolute but allow for particularized discovery when needed to preserve evidence or prevent undue prejudice to a party. *See In re Grand Casinos, Inc. Sec. Litig.*, 988 F. Supp. 1270, 1272 (D. Minn. 1997) ("If, . . . Congress had intended an absolute stay on discovery, then Congress would not have authorized a judicial reprieve from such a stay, when a reprieve is needed."). Such statutory flexibility lends further support to the argument that an exception based on the presence of non-fraud common law claims brought under diversity jurisdiction would not frustrate the will of Congress. Finally, permitting discovery to proceed here would not represent an impermissible "end run" around the PSLRA's automatic stay provisions. Plaintiff [**12] did not simply append state law securities fraud or common law fraud claims to its Complaint in order to bypass the stay. Plaintiff's state law claims are substantive claims which, in addition to fraud claims, include separate and distinct breach of contract and tortious interference claims.

Id. at 166-67.

The Wilt Plaintiffs cannot be accused of merely appending state law claims to federal securities claims because they assert no claims under the federal securities laws. Their Texas state law claims are substantive claims separate and distinct from federal securities claims asserted by other plaintiffs in other actions. The Wilt Plaintiffs' state law claims admittedly overlap the federal securities claims of other plaintiffs to an extent that justifies consolidation, but the state law claims asserted by the Wilt Plaintiffs have a substantial element of uniqueness in pursuing corrupt officials who bear responsibility for

the Enron scandal and should be held accountable under conspiracy principles. No other plaintiffs seek to hold corrupt officials accountable. Accordingly, under *Tobias*, discovery should be permitted on the Wilt Plaintiffs' state law claims, and at the very least a further Scheduling Order should permit the Wilt Plaintiffs to conduct discovery for the purpose of identifying and naming the Doe corrupt officials in a further amended pleading.

In *Lapicola v. Alternative Dual Fuels, Inc.*, 2002 U.S. Dist. LEXIS 5941 (N.D. Tex. 2002), the individual plaintiffs filed suit in federal court alleging federal securities fraud and state law claims. They subsequently filed a first amended complaint in federal court, omitting the state law claims, and a separate action in Texas state court, reasserting the state law claims asserted in their original federal pleading. The Court refused to stay the separate state action:

The Court notes at the outset that it is not clear that the stay provisions of sections 77z-1(b)(4) and 78u-4(b)(3)(D) are even applicable to private individual lawsuits brought in state court. See *[In re] Transcript International [Secs. Litig.]*, 57 F. Supp.2d [836,] 842-47 [(D. Neb. 1999)] (holding that the words "a private action in a State court" appearing in the statute refers only to private state court *class actions*). Assuming *arguendo* that this Court has the power to stay discovery in a private individual state court action alleging only state law claims, defendants have failed to make "a proper showing" that a stay is warranted in this case. There are two primary purposes for the stay of discovery contained in the PSLRA: (1) to prevent the imposition of any unreasonable burden on a defendant before disposition of a motion to dismiss; and (2) to avoid the situation in which a plaintiff sues without possessing the requisite information to meet the heightened pleading requirements of the PSLRA, then uses discovery to acquire that information and resuscitate a complaint that is otherwise subject to dismissal. See *In re Comdisco Securities Litigation*, 166 F. Supp.2d 1260, 1263 (N.D. Ill. 2001). Neither of those concerns is implicated here. Plaintiffs have represented that they will not use any discovery obtained in the state court action to amend their federal complaint before a ruling on defendants' motion to dismiss. Nor have defendants presented any evidence or argument that the state court discovery is unduly burdensome. Moreover, plaintiffs' state law claims do not mirror the federal securities claims but represent "legally cognizable, substantive causes of action." Cf. *Tobias Holdings*, 177 F.

Supp. 2d at 168 (declining to stay discovery as to state law claims alleged in federal securities case). Consequently, the claims asserted in the parallel state court action do not interfere with the jurisdiction of this Court or threaten its judgment in any way. *Id.*

2002 U.S. Dist. LEXIS at *4-*6 (original emphasis; footnote and reference omitted).

The Wilt Plaintiffs have deferred and will continue to defer to Lead Counsel in the *Newby* action to take the lead on discovery concerning areas of factual and legal overlap between the Consolidated Complaint in *Newby* and the First Amended Complaint in the *Wilt* action. However, the Wilt Plaintiffs must be allowed to conduct discovery into the factual and legal issues unique to the *Wilt* case, primarily at this time to identify and name Doe corrupt officials. Such discovery will neither unreasonably burden the defendants, nor circumvent the heightened pleading requirements of the PSLRA – which do not apply to Texas state law claims. Rather, permitting the Wilt Plaintiffs to conduct discovery in order to identify and name Doe corrupt officials by their true names in a further amended pleading will further the Court’s jurisdiction and management by bringing Doe corrupt officials fully into the case and making them subject to the Court’s orders and control.

C. Discovery Must Be Permitted to Identify Doe Corrupt Officials.

The corrupt officials need to be identified through formal discovery because their corruption, acts, and omissions to help their benefactors – i.e. Enron, Arthur Anderson, Vinson & Elkins, and their officers, directors, and partners – occurred in secret. The Wilt Plaintiffs believe that adequate information can be obtained for identification purposes by discovery directed to Enron’s political action committee, the Arthur Andersen defendants, the Vinson & Elkins defendants, director and officer defendants, and certain third parties, primarily through document demands, subpoenas, and depositions of public officials. This discovery can easily proceed independently of the activities of Lead Counsel and will not

interfere with other events and deadlines scheduled in the Consolidated lead Action. The Wilt Plaintiffs and their counsel of record at Judicial Watch, Inc. are uniquely positioned and qualified to pursue this corruption angle and should be permitted to do so quickly.

D. Amendment Must Be Permitted to Name Doe Corrupt Officials.

The amended Scheduling Order in *Newby* contemplates that new parties will be added in the future. For this purpose, the Court set a deadline of January 2, 2003, to join new parties or to file third party complaints/claims. The Wilt Plaintiffs have no objection in principle to the same or similar deadline in a Scheduling Order for non-class securities fraud actions, provided that the Wilt Plaintiffs are permitted in the meantime to conduct discovery calculated to identify and name the Doe corrupt officials who bear liability as co-conspirators. Otherwise, the amended Scheduling Order in *Newby* should control.

3. SUMMARY AND CONCLUSION.

The Court's amended Scheduling Order appears adequate for purposes of the various actions consolidated with *Newby*. Nonetheless, the Wilt Plaintiffs do not object in principle to entry of a further Scheduling Order to defer motions to dismiss non-class complaints, so long as the Wilt Plaintiffs are permitted in the meantime to conduct their discovery calculated to identify and name Doe corrupt officials. Accordingly, the Wilt Plaintiffs request that any further Scheduling Order include the following provisions:

¶ 1. Notwithstanding any other provisions of this Order, the Wilt Plaintiffs may immediately conduct discovery calculated to identify and name by their true names in a further amended complaint Doe Defendants described as "Corrupt Officials" in the First Amended Complaint in the *Wilt* case. This discovery hereby permitted includes (1) interrogatories and requests for production of documents to any party named in the *Wilt* case; (2) oral depositions of custodians of records, government agencies, and past and present government employees and

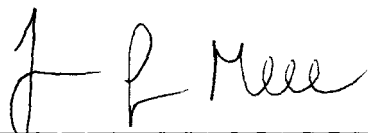
officials, with production of documents at these depositions; and (3), with prior consent of Lead Counsel in the *Newby* case, oral depositions of defendants named in the *Wilt* case. Depositions taken pursuant to provisions (2) and (3) above shall be limited to identifying and naming Doe Defendants by their true names, and without prejudice to later depositions on issues of general liability, damages, or other issues in dispute.

¶ 2. Notwithstanding any other provisions of this Order, the deadline to join new parties, to identify Doe Defendants by their true names, and to file third party complaints or cross-complaints/claims is January 2, 2003.

The Wilt Plaintiffs do not appear to have been provided with an actual form for the proposed further Scheduling Order. Therefore, counsel cannot comment further on any specific provisions that may have been proposed by the moving parties.

Dated: May 22, 2002

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CERTIFICATE OF SERVICE

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Consolidated Lead Case No. H-01-3624**

**Wilt v. Fastow,
Case No. H-02-0576**

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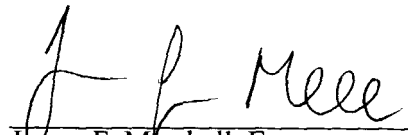
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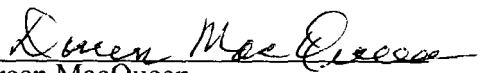
I certify that on May 22, 2002, I served a true and correct copy of the foregoing document by fax on the following person at the fax number indicated:

Carolyn S. Schwartz
United States Trustee, Region 2

Fax Number:
(212) 668-2255

I further certify that on May 22, 2002, I served a true and correct copy of the foregoing document, by first class mail, on the following person at the address indicated:

Dr. Bonnee Linden, Pro Se
Linden Collins Associates
1226 West Broadway
P.O. Box 114
Hewlett, New York 11557


Doreen MacQueen